

I.R. NO. 2021-20

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Respondent,

-and-

Docket No. CO-2021-135

NEW JERSEY LAW ENFORCEMENT
COMMANDING OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee extends in an interim relief Order a temporary restraint based on an unfair practice charge and interim relief application alleging that the public employer is violating the unit work rule by advising of its intention to reassign seven unit majors currently staffing the Central Operations Desk (COD) to various jail facilities and assign non-unit sergeants to the COD in their place. It is uncontested that majors historically and exclusively staffed the COD. The employer's action allegedly violates section 5.4a(1) and (5) of the New Jersey Employer Employees Relations Act. N.J.S.A. 34:13a-1, et seq.

The Designee, following an application of the Local 195 test as set forth in City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998), determined that the public employer had not borne its burden of demonstrating that it is reorganizing the delivery of services, a recognized exception to the unit work rule. Inasmuch as the action appears to occur during the parties' negotiations for a successor agreement, the Designee determined that the majority representative met the standards required for granting interim relief. The case was returned to regular processing.

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Appearances:

For the Respondent,
Gurbir S. Grewal, Attorney General
(Ryan J. Silver, Deputy Attorney General)

For the Charging Party,
Mets Schiro & McGovern, LLP attorneys
(James M. Mets, of counsel)

INTERLOCUTORY DECISION

On January 4, 2021, New Jersey Law Enforcement Commanding Officers Association (NJLECOA or Association) filed an unfair practice charge against the State of New Jersey, Department of Corrections (State), together with an application for interim relief seeking a Temporary Restraint, a brief, certification and exhibits. The charge alleges that the State unlawfully intends to eliminate seven (7) unit positions of "major" and change staffing of the Central Operations Desk (COD) by replacing majors with non-unit sergeants, the former having, ". . . traditionally and historically performed all within the COD." The parties are

allegedly engaged in negotiations for a successor collective negotiations agreement. The State has allegedly denied the Association's request to negotiate over the staffing changes and has claimed that the elimination of unit positions will result in cost savings. The State's conduct allegedly violates section 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

The application seeks to enjoin the State from eliminating major positions at the COD until negotiations on that action occur; and to enjoin the implementation of staffing changes that would place sergeants at the COD.

On January 6, 2020, I issued an Order to Show Cause with Temporary Restraints temporarily enjoining the State from assigning non-unit sergeants to the COD and from eliminating major positions. The Order also set forth dates for the submission of a response and reply and for argument in a telephone conference call on January 21, 2021. On the return date, the parties argued their respective cases. The following facts appear.

^{1/} These provisions prohibit public employers, their representatives or agents from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

The State and NJLECOA signed a collective negotiations agreement (CNA) extending from July 1, 2015 through June 30, 2019 (NJLECOA Exhibit C). Article 1 (Recognition) incorporates an appendix identifying correctional police major, correctional police captain, Juvenile Justice Commission, supervising conservation officers, supervising parole officer and specified others included in the unit and excluding eight enumerated categories, including "non-police employees" and "non-supervisory police employees."

Article XXIX (Layoff and Recall) provides in a pertinent part:

A. When it is necessary to lay off employees, the Association shall be notified at once and the conditions outlined below and the established protections administered by the Civil Service Commission shall be observed.

Other pertinent provisions concern a mandatory notice period, specifying that the State, ". . . whenever possible, will try to avoid layoff by transferring, reassigning or offering to demote employees to available vacancies" and recognizing that the article's provisions illustrate rights established and governed by the Civil Service Commission (Exhibit C, Article XXIX, section C, E and K).

The parties are currently negotiating a successor CNA. They have held twelve negotiations sessions from April, 2019 through December, 2020 and two labor/management meetings (Association

President Trevor Beatty certif., para. 2, 6). The unit is comprised of thirty-seven (37) majors (and no sergeants), who oversee all "custody operations" in the State, and supervise all ranks in the Corrections system, including lieutenants, sergeants and officers. The COD is staffed with seven majors, who gather information from twelve separate jails, provide guidance to shift commanders, report incidents and act as liaisons between the jails and the executive staff. "Historically, only majors have done this work in the COD" (Beatty certif., para. 9, 11, 12). More specifically, "the COD unit was established specifically to be staffed by majors and [no] other rank [has been] assigned to the unit since its inception in December, 2011" (Beatty certif., para. 13).

A May, 2018 Civil Service job description of "correctional police major" provides at the outset:

Under the directions of Administrator or Associate Administrator, Prison Complex or higher level supervisor in the Department of Corrections, provides oversight for custody programs and operations, functions as a higher level manager in the custody workforce chain of command providing oversight of subordinate custody employees, and ensures the care, custody and maintenance of discipline among inmates at all levels of incarceration residing at various site locations; does other related duties as required.

The job description provides twenty-three "illustrative examples of work" with the caveat that "all duties performed on the job may not be listed." Verbatim examples include:

Manages the custody work force chain of command and oversees custodial operations;

Ensures the observance of laws and regulations by inmates, custody staff, civilian employees and visitors;

Reviews pertinent criminal intelligence regarding institutional security and ensures appropriate action;

Oversees the preparation of staff schedules including the assignment of officers to posts and shifts, the scheduling of overtime and vacation scheduling. Evaluates need for overtime and implements procedures for eliminating unnecessary overtime expenditures;

Responds to attempted or actual escapes, enforces escape plans and submits comprehensive reports of circumstances to the appropriate administrator and/or director;

Plans, organizes and assigns the work of the organizational unit and evaluates employee performance and conduct, enabling the effective hiring, promotion, termination and/or disciplining of subordinates;

Responsible for operations of custodial staff and the briefing of shift lieutenants regarding proper performance of essential institutional routines;

Serves as a member of the various classification committees and utilizes inmate classification material to make judgments regarding the degree of custody required for an individual inmate to prevent disturbances and escapes;

Evaluates the fiscal needs of the custody unit, submits requests for budget appropriations, attempts to operate within fiscal restraints and justifies cost overruns;

May operate COD as the centralized contact person where all statewide facilities report incidents and occurrences; records, screens and processes information and makes notifications to the appropriate authorities;

May serve as a regional supervisor for more than one correctional facility, conducting audits of custody programs and serving as a liaison between the Central Office Administration and the correctional facilities.

[State Exhibit C]

Among the eighteen listed "knowledge and abilities" set forth in the job description that prospective majors possess are:

Knowledge of custodial care procedures in a correctional setting and the issues related to managing and maintaining a secure, safe and orderly correctional facility;

Knowledge of the methods used in supervising the custody, rehabilitation, protection, housing, feeding, work and discipline of inmates to assist them toward social rehabilitation;

Ability to assign and instruct the work of subordinate employees and supervise their work and performance;

Ability to develop and execute the necessary plans to contend with emergencies and other crisis situations, and to remain calm and decisive in those situations.

[State Exhibit C]

Michelle Ricci has been employed by the State in the Department of Corrections since 1987 in various and apparently

ascendant capacities, including Deputy Commissioner since August 1, 2020 (Ricci cert., para. 1). Victoria Kuhn has been employed by the State in the Department of Corrections since 2007, most recently as Chief of Staff since May, 2020 (Kuhn cert., para. 1). In that capacity, Kuhn is responsible for labor-management relations within the Department and she convenes labor-management meetings to address relevant matters (Kuhn cert., para. 2).

Ricci certifies:

. . . [I]n practice, the COD has not served to provide direction or guidance to shift commanders at the various facilities because NJDOC (State) already maintains an on-call rotation of management for each facility. The individuals on the on-call rotation have historically addressed any issue that has arisen. [Ricci cert., para. 2]

Ricci certifies that the December 3, 2011 "IMP (Internal Management Policy) #1.00 COD" provides that the position "consists of a supervisor and communications operator 24 hours per day, seven days per week" and that "the COD is to be staffed by the rank of lieutenant or higher at all times" (Ricci cert., para. 4).

On or about October 23, 2020, Ricci, Kuhn and State Human Resources Director Elizabeth Whitlock met with Association ". . . executive board members to discuss the consolidation of the Central Reception Assignment Facility (CRAF) and the reassignment of two majors from [there] to other [Correctional] facilities"

(Kuhn cert., para. 3). In the meeting, the State representatives advised that [Corrections],

. . . was also reviewing the COD for possible reorganization as it is not operating in the manner envisioned by the [Corrections] administration. As a result, management advised the Association it has deemed a reorganization or consolidation of the COD to be operationally necessary and fiscally responsible. [Kuhn cert., para. 4]

Association President Beatty certifies that in a labor-management meeting before November 3, 2020, the Association representatives were advised that management, “. . . has been discussing the removal of majors at the COD and replacing majors with sergeants” (Beatty cert., para. 17).

On November 3, 2020, Beatty wrote a letter to State Commissioner Hicks explaining in detail, “. . . the refut[ation of] the claim that COD can be staffed with the same number of sergeants and be more cost effective than the current cost of operation” (Association Exhibit A). The sections of the letter are captioned, “staffing difference between sergeants and major;” “the cost breakdowns;” “effectiveness of majors vs. sgts;” and “additional major tasks.” Beatty wrote of the Association’s request to meet with the Commissioner and staff, “to further discuss this matter” (Association Exhibit A).

On December 3, 2020, unspecified State and Association representatives met again and, “. . . the CRAF and COD reorganization or consolidation were again discussed. Management

again advised the Association that it had deemed a reorganization or consolidation to be operationally necessary and fiscally responsible" (Kuhn cert., para. 5).

On December 14, 2020, Kuhn wrote a letter to Association President Beatty, initially acknowledging receipt of his November 3rd letter. Kuhn wrote:

Please be advised that, following a review, the Department shall continue with the restructuring of the COD. Given the current responsibilities of the COD, the Department deems the restructuring to be both operationally appropriate and fiscally responsible.

The Department will continue to work with NJLECOA throughout the restructuring of the COD, as well as the consolidations of CRAF to ensure that you, your Executive Board and your membership remain informed
[Association Exhibit B; Kuhn cert., para. 6]

On December 17, 2020, Kuhn wrote another letter to Beatty, confirming that, ". . . it was deemed operationally appropriate and fiscally responsible to continue with the reassignment of six (6) major positions from the COD. As indicated during the meeting, one (1) major will remain at the COD and three (3) additional positions will be added to the second shift (one designated at each of the following facilities: NJSP, GSYCF and SWSP)." Kuhn also wrote of "postings" and "reassignment IMP," two other topics discussed in a (virtual) meeting on an unspecified date (State Exhibit A).

Ricci certifies:

After reviewing the operations of the COD, the State has determined that it is operationally necessary and fiscally responsible to reorganize and consolidate the COD. A change in the structure of existence of the COD is necessary to efficiently and effectively meet the goal of communicating, recording and reporting all unusual incident/occurrences from all of the facilities throughout the State to ensure the proper response. Specifically, the State has determined that majors, with their extensive knowledge, skills and experience, are better served in [Correctional] facilities, where they can serve in managerial roles and provide oversight and guidance rather than serve in a role that primarily requires recording and reporting of information. [Ricci cert., para. 10]

Ricci certifies that although the State, “. . . has decided to reorganize the COD, no plan has been formulated yet” and “no final determination has been made.” She also certifies:

Management has advised NJLECOA that regardless of the final determination of the details of the reorganization, no majors will be terminated or demoted as a result of any restructuring or consolidation of the COD. Rather, the majors will be reassigned to NJ [Correctional] facilities as necessary . . .

Any claim that a reorganization will eventually result in a reduction in the number of positions for majors due to attrition is speculation. [The State] is unable to determine whether it will need to reduce the number of positions for majors because it will not be able to evaluate the effect of any reassignments until they have been in place for some time. [Ricci cert., para. 16, 17]

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over mandatorily negotiable terms and conditions of employment. The unit work rule provides that an employer must negotiate before using non-unit employees to do work traditionally performed by unit employees alone. See Hudson Cty. Police Dept., P.E.R.C. No. 2004-14, 29 NJPER 409, 410 (¶136 2003). In City of Jersey City v. Jersey City POBA, 154 N.J. 555, 568 (1998), our Supreme Court held that the negotiability balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982) must be explicitly applied to determine whether in a given set of circumstances, an employer may

unilaterally transfer duties previously performed by police officers to civilians. That test provides:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [88 N.J. at 404-405]

In applying the dispositive third prong, the Court agreed with the City that its actions (civilianization of dispatching duties) were taken primarily to augment its ability to combat crime by increasing the number of police officers in field positions. It concluded that because the City implemented the reorganization for the purpose of improving the police department's "effectiveness and performance," the City's actions constituted an inherent policy determination that under Local 195, would be impermissibly hampered by negotiations. Id. at 573.

The unit work rule contemplates three exceptions in which the transfer of unit work is not mandatorily negotiable. The exceptions apply where (1) the union waived its right to

negotiate over the transfer of unit work; (2) historically, the job was not within the exclusive province of unit personnel; and (3) the municipality is reorganizing the way it delivers government services. Jersey City, 154 N.J. at 577.

The State argues that its contemplated, “. . . reorganization or consolidation of the COD is operationally necessary and fiscally responsible,” thereby constituting a “non-negotiable managerial prerogative” (brief at 14). It also avers that the re-assignment of majors will not result in their demotions or terminations and that any future reduction in the number of positions is “speculation.”

The Supreme Court in Jersey City recognized that since job losses there weren't expected to occur the concerns that inspired the unit work rule weren't “fully implicated” Id. at 576. But the Court didn't find that the unit work rule was wholly inapplicable and it appears to apply even in circumstances where a transfer of unit work may not result in the immediate diminution of the collection negotiations unit. Union Cty., I.R. No. 2002-12, 28 NJPER 279 (¶33105 2002), mot. for recon. den., P.E.R.C. NO. 2003-14, 28 NJPER 352 (¶33126 2002); Bergen Cty., H.E. No. 91-39, 17 NJPER 292, 298n. 16 (¶22129 1991), adopted P.E.R.C. No. 92-17 17 NJPER 412 (¶22197 1991) (transfer of unit work resulted in loss of unit jobs because, although no unit

employees were laid off, their positions were abolished and they were placed in vacant positions).

Cost savings is an admitted objective of the State in this matter. The Court in Jersey City suggested that employee interests may be more heavily weighted, and that the unit work doctrine may come into play, where the employer's only reason for transferring unit work is to save money ("[I]f money is the ultimate issue for the employer, the employer will not be concerned with who performs the job as long as it is performed in a manner that will effectuate cost savings." 154 N.J. at 582). The Court then added that that rationale for prohibiting a shift of unit work doesn't apply where the purpose of the change is to free up more police personnel for field jobs. Ibid.

The Commission has found that if an employer exercises a managerial right to reorganize the way it delivers government services, it may by necessity transfer job duties to non-unit employees without incurring a negotiations obligation. Monroe Fire Dist. # 2, P.E.R.C. No. 98-158, 24 NJPER 347, 350 (¶29165 1998). The Court in Jersey City cautioned that, ". . . whether a public employer's actions will be deemed to constitute a legitimate reorganization depends both on the employer's motivations and whether there is a change in the delivery of services." 154 N.J. at 578-579.

Union Cty is instructive. There, the Designee enjoined the County from shifting certain inmate transportation duties from corrections officers who had performed those duties exclusively for 14 months, to non-unit sheriff's officers, until negotiations were completed. The Designee wasn't persuaded of a reorganization because the employer, ". . . gives no specifics how the work transfer has affected the delivery of government services" or accomplishes the asserted goal of "improving performances." The Designee wrote: "Absent such specifics, the County's claim of managerial prerogative may constitute a hollow contention." I.R. No. 2002-12, 28 NJPER at 282. The Commission essentially affirmed. P.E.R.C. No. 2003-14, 28 NJPER at 353. See also, Essex Cty. and Essex Cty Sheriff's Office, I.R. NO. 2011-29, 37 NJPER 30 (¶10 2011).

In this case, I glean no specific facts describing how the transfer of COD duties from majors to sergeants "reorganizes the process," creates "efficiencies" or "improves performances." Deputy Commissioner Ricci has certified only that the seven majors assigned to COD will better serve in various corrections facilities, where they can provide "oversight and guidance. . . ." No facts indicate how or if the duties of an unspecified number of sergeants prospectively assigned to COD will differ from those currently entrusted to majors. Nor do any particularized facts suggest that operational management at any of the correctional

facilities will benefit from adding majors. Majors are already deployed to those facilities and no facility is averred to be needful of additional "oversight and guidance." Moreover, the State hasn't revisited in its response the necessity (as set forth in the State's 2011 Internal Management Policy) of staffing COD with officers "in the rank of lieutenant of higher at all times." Just how or why sergeants would now appropriately fulfill that policy directive is unclear. The State hasn't identified or borne its burden of demonstrating how the transfer of COD assignments from majors to sergeants accomplishes the asserted goal of restructuring or reorganizing the COD. The facts do not appear to implicate the reorganization exception to the unit work rule.

The Supreme Court in Jersey City requires the application of the Local 195 balancing test to the facts and issues raised in each case. It appears that the NJLECOA has met the first part of the test, specifically, whether the "item" intimately and directly affects employees' work and welfare. Majors have exclusively performed COD duties since its inception in 2011. I infer that the substitution of seven unit employees will adversely affect the Association's interest in maintaining the size of the unit. Accordingly, the transfer of COD duties appears to intimately and directly affect the work and welfare of majors.

The second part of the Local 195 test is not implicated in this case because no statute appears to partially or fully preempt negotiations over COD duties. See, for example, Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n., 91 N.J. 38, 44 (1982) (a preemptive statute must expressly, specifically and comprehensively fix a employment condition so firmly that it cannot be changed through negotiations).

I must balance the interest of public employees and the public employer, as specifically set forth in the third prong of the Local 195 test. For reasons I've described in this decision, it appears that the transfer of COD duties from unit majors to non-unit sergeants is closer to a substitution of ". . . one person for another without changing the structure or nature of the job, [which] does not eliminate per se, a duty to negotiate over the transfer of duties to non-unit employees." Jersey City, P.E.R.C. No. 96-89, 22 NJPER 251, 252 (¶27131 1996); Union Cty; Essex Cty and Essex Cty Sheriff's Office. Majors wish to continue performing COD duties for which they are apparently qualified. The Association has a legitimate interest in maintaining the size of the negotiations unit (the State has not certified that major positions will not be attrited as a consequence of its disputed action). On the other hand, the State hasn't clearly revisited or articulated a policy goal necessitating the unilateral transfer of COD duties, nor the

manner in which the transfer affects the delivery of government services. These omissions in good part may be due to the tentativeness or admitted lack of clarity in the State's "plan." On balance, it appears to me that the interests of majors prevail over the State's currently articulated desire to have sergeants perform COD duties.

For all of the reasons mandated by an application of unit work rule or the Local 195 test, the same result appears. The State has incurred an obligation to negotiate over the reassignment of COD duties from unit majors to non-unit sergeants. Accordingly, I find that NJLECOA has established a substantial likelihood of success on the merits of its charge.

The parties are currently in collective negotiations for a successor CNA. Any unilateral change in a terms and condition of employment during negotiations has a chilling effect and undermines labor stability. Rutgers, The State University and Rutgers University Coll. Teachers Ass'n., et al., P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979), aff'd as mod. NJPER Supp. 2d 96 (¶79 App. Div. 1981). I find that the Association has established irreparable harm in its application.

In weighing the relative hardship to the parties resulting from a decision to grant or deny interim relief, I find that the scales favor the Association. Majors have exclusively performed COD duties since the COD's inception in 2011. The State hasn't

asserted that majors have performed inadequately; it maintains that the COD hasn't operated as "envisioned," but has not revisited its written policy that superior officers in the rank of lieutenant or higher shall staff the COD. The State has not factually asserted how majors, while continuing to work at COD - at least during negotiations for a successor CNA - adversely impact management of the jails. On the other hand, the Association (if majors are forced to relinquish their COD assignments) is not assured that the negotiations unit will not diminish in size. The State appears to suffer little or no harm if the Temporary Restraint is maintained through the period of collective negotiations and until the charge is resolved.

On balance, it doesn't appear that the public interest is harmed by granting an interim relief order in this case. Perhaps an unspecified financial cost is associated with maintaining majors assigned to the COD, if compared with such costs if sergeants are assigned there, instead. No facts suggest that the public is at any heightened risk of harm if majors continue to perform COD oversight. The public interest is also served by requiring the State to adhere to the tenets of the Act.

ORDER

The Temporary Restraint enjoining the State from assigning non-unit sergeants to the COD to supplant majors currently assigned there is extended in this interim order and will remain in effect pending a final Commission order in this matter. The case will be processed in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: January 28, 2021
Trenton, New Jersey